Office - Supreme Court
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RODNEY STEVEN BIGGS,
Plaintiff-Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a corporation,
Defendant-Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD M. ROESSLER
5000 West Main Street
Box 692
Belleville, Illinois 62222
(618) 277-9000
Attorney for Defendant-Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement of the Case	1
Summary of Reasons for Denying Petition for Writ of Certiorari	3
Reasons for Denying the Petition for Writ of Certiorari.	4
Conclusion	5

TABLE OF AUTHORITIES

Atlantic C. L. RR. Co. v. Southwell, 275 U.S. 64, 72 (1927)	4
Biggs v. Terminal RR. Ass'n. St. L., 110 Ill. App. 2d 709, 442 N.E.2d 1353, 1355 (1982)	4
Miller v. Avirom, 384 F.2d 319, 321-23 (D.C. Cir. 1967)	4
Pedrick v. Peoria and Eastern RR. Co., 37 Ill.2d 494, 229 N.E.2d 504 (1967)	4

No. 82-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RODNEY STEVEN BIGGS,
Plaintiff-Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a corporation,
Defendant-Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out of an injury plaintiff, Rodney Biggs, sustained during a fight with a co-employee, Robert Parr, on April 17, 1979. Plaintiff filed this suit under the Federal Employers Liability Act (FELA), 45 USC §51 *et.seq.*, against defendant, Terminal Railroad Association of St. Louis[1] on May 1, 1979.

---

[1]Terminal Railroad Association of St. Louis is a corporation whose stock is owned by Southern Railway Company, Missouri Pacific Railroad Company, Seaboard System, Norfolk & Western Railway Company, Illinois Central Gulf Railroad Company, Burlington Northern Railroad Company, St. Louis & Southwestern Railway Company, Missouri, Kansas & Texas Railroad Company, and Chessie System Railroads.

On April 17, 1979, both plaintiff and Parr had been employed by defendant for approximately fifteen days. (R.161). Prior to April 17, 1979, neither had been involved in any fights or arguments of any kind and both had gotten along well together. (R.161).

On the morning of April 17, 1979, plaintiff, Parr, Ron Gartner, and other workers assembled in a shanty located in defendant's railroad yards. (R.162) Ron Gartner was the assistant track foreman. Everyone then walked to a nearby tool shed to get the tools they needed for their work. (R.33). While in the tool shed plaintiff asked Gartner, "Can I whip him?" (R.163). Gartner said no, directed the workers to begin their work, and then left the tool shed. (R.163). At this point, Gartner had no reason to believe Parr was serious. (R.163). Gartner testified that kidding and teasing is common among defendant's employees. (R.163).

Plaintiff claimed that after Gartner left the tool shed, Parr struck him on the jaw with with his fist. (R.39). Plaintiff did not introduce any evidence that anyone witnessed this occurrence.

Plaintiff then left the tool shed and began working on the tracks at the job of pulling spikes. (R.40). The fight between plaintiff and Parr, in which plaintiff was injured, occurred near the tracks. Plaintiff struck the first blow of the fight when he hit Parr in the mouth with a railroad spike. (R.59-60, 72-73, 165-66 & 179).

Gartner was not facing plaintiff and Parr when plaintiff hit Parr, but turned when he heard plaintiff strike the blow with the railroad spike. (R.165-66). Gartner then ordered both men to stop their fighting. (R.166). In the meantime, a fellow employee had restrained plaintiff. (R.72). Parr reacted to the blow from plaintiff by threatening plaintiff with a pick axe but Gartner ordered him to drop the pick axe and return to work. (R.73, 166, 175 & 179). Parr was also restrained by co-workers. (R.179). Parr dropped the pick axe and Gartner turned towards

plaintiff who had turned his back on Parr. Parr then picked up a railroad spike and reached over Gartner's shoulder and hit plaintiff in the back of the head with the spike. (R.42 & 74). The injury plaintiff sustained as a result of this blow to the back of the head is the basis of this lawsuit.

A jury returned a verdict in favor of plaintiff. The Appellate Court of Illinois for the Fifth District reversed the judgment on the verdict. Plaintiff sought leave to appeal to the Illinois Supreme Court but his petition was denied. Plaintiff is now seeking review of the appellate court's decision by way of a writ of certiorari.

SUMMARY OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The appellate court's decision does not conflict with this Court's FELA decisions because defendant did not have prior notice of Parr's alleged vicious character.

REASONS FOR DENYING THE PETITION FOR FOR WRIT OF CERTIORARI

Plaintiff's petition for a writ of certiorari does not set forth any valid reasons why the United States Supreme Court should review this case on a writ of certiorari.

The appellate court's decision does not conflict with this Court's FELA decisions. This Court has held that a railroad has no duty to anticipate and prevent an attack on an employee by a fellow employee unless the railroad knows that the assailant has a vicious character. *Atlantic C. L. RR. Co.* v. *Southwell,* 275 U.S.64, 72 (1927). The appellate court's decision does not conflict with this principle because the appellate court correctly concluded that defendant did not have prior notice of Parr's alleged vicious character. *Biggs* v. *Terminal RR. Ass'n St.L.*, 110 Ill. App. 2d 709, 442 N.E.2d 1353, 1355 (1982). Since defendant did not have prior notice of Parr's alleged vicious character, defendant was entitled a directed verdict. Plaintiff claims that the events which occurred immediately before the fight in which he was injured constituted prior notice to defendant. The Appellate court properly held, however, that Parr's alleged vicious character brought only to the attention of an assistant track foreman during the fight, was not prior notice to defendant.

Plaintiff's claim that the standard from *Pedrick* v. *Peoria & Eastern RR. Co.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967) was improperly applied by the appellate court is irrelevant because, under any standard, defendant did not have prior notice and was entitled to a directed verdict.

Plaintiff suggests for the first time that it was not necessary to prove that defendant had prior notice of Parr's alleged vicious character because the assistant track foreman was present during the fight. Plaintiff may not raise on appeal a new theory of liability which was not presented in the trial court. *Miller* v. *Avirom,* 384 F.2d 319, 321-23 (D.C. Cir. 1967). Further, there is no legal basis for this theory.

Plaintiff also suggests that defendant was negligent because the assistant track foreman did not intervene between the combatants. In plaintiff's appellate court brief, however, he conceded that Gartner did not have a duty to step between the combatants. Brief of Plaintiff-Appellee at 20. This contention also has no basis in law.

CONCLUSION

For the reasons stated above, defendant prays that plaintiff's Petition for Writ of Certiorari be denied.

Respectfully submitted,

Richard M. Roessler
5000 West Main Street
Box 692
Belleville, Illinois 62222
(618) 277-9000

Attorney for Defendant-
Respondent